Supreme Court, U.S.
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No. 96-577

IN THE

Supreme Court of the United States

October Term, 1996

TRISTAR CORPORATION,

PETITIONER,

v.

ROSS A. FREITAS AND CAROLYN SAFER KENNER,

RESPONDENTS.

On Petition for a Writ Of *Certiorari* to the United States Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY STATEMENT

The decision of the Court of Appeals for the Second Circuit warrants review by this Court because its interpretation of the federal securities statute at issue conflicts squarely with the decision of the Court of Appeals for the Ninth Circuit. Moreover, if the decision below is upheld, it will adversely impact the millions of security holders of publicly traded companies the statute was designed to protect.

The respondents are insiders who reaped enormous short-swing profits and then failed to disclose those trades for more than two years. They seek to minimize the import and impact of the decision below on two principal grounds: (1) there is no actual conflict between the decision of the Second Circuit below, in *Tristar Corp. v. Freitas*, 84 F.3d 550 (2d Cir.), *reh'g denied* (1996), and the long standing precedent decision of the Ninth Circuit in *Whittaker v. Whittaker Corp.*, 639 F.2d 516 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981), and (2) the issue does not involve an important question of federal law. *See* Respondents' Opposition Brief at 5-7. Neither claim is justified.

1. *There is a direct conflict between the courts of appeals.* In *Whittaker*, the court of appeals reviewed three possible alternative constructions of the two-year limitations period for claims under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b) (1994), and the available precedent for each construction. The Ninth Circuit adopted the construction whereby the two-year period begins to run only when the transactions are disclosed in the insider's Section 16(a) report, 15 U.S.C. § 78 p(a)(1994). *Whittaker*, 639 F.2d at 530. In this case, the District Court expressly followed the *Whittaker* rule and found Tristar's Section 16(b) action timely, because it was filed within two years of the date the insiders belatedly filed their Section 16(a) reports. *Tristar Corp. v. Freitas*, 867 F. Supp. 149, 153-54 (E.D.N.Y. 1994), *rev'd*, 84 F.3d 550 (2d Cir. 1996). The Second Circuit, how-

ever, expressly disavowed the *Whittaker* rule as it has been understood by the District Court and commentators alike.[1]

The Second Circuit's assumption that *Whittaker* "restarts" the two-year limitations period, 84 F.3d at 553, reflects a mistaken assumption as to the relationship between Section 16(a) and Section 16(b) that conflicts directly with *Whittaker*. Nothing in *Whittaker* purports to link the Section 16(b) limitations period with the specific requirements of Section 16(a) for the due date of a report, particularly where, as here, the report is indisputably untimely. *Whittaker* simply starts the running of the statute whenever the report is actually filed. Under the Second Circuit's interpretation, which rests on an assumed linkage between the Section 16(b) limitations period and Section 16(a) filing requirements, *all* insiders are gratuitously provided with a grace period (of a minimum of 10 days and possibly as many as 410 days) during which the statute runs, regardless of whether the report ultimately is filed timely or untimely. Under *Whittaker*, the late filer obtains no grace period. Thus, the conflict between these circuits' interpretations of the Section 16(b) limitations period is beyond dispute. Indeed, if the Second Circuit had followed the *Whittaker* rule -- as the District Court did -- it would have concluded that the action was timely filed. Petitioner respectfully submits this Court should resolve this circuit split.

2. *The issue concerns an important question of federal law with far-reaching implications.* Congress enacted Section 16(b) in order "to curb the evils of insider trading" and to "eradicate speculative abuses" by insiders. *Reliance Electric Co. v. Emerson Electric Co.*, 404 U.S. 418, 422 (1972).

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[1] *See, e.g.*, Marc I. Steinberg & Daryl L. Lansdale, Jr., *The Judicial and Regulatory Constriction of Section 16(b) of the Securities Exchange Act of 1934*, 68 Notre Dame L. Rev. 34, 59 (1992) (supporting *Whittaker* rule); Peter J. Romeo & Alan L. Dye, *Section 16 Treatise and Reporting Guide* § 8.03, 8-76 (E.P. Executive Press, Inc. 1994) (noting prevailing *Whittaker* rule for determining limitations period).

Stated beneficiaries of the statute include outside security holders of the issuer who need to be protected from the trading schemes of insiders. *See* S. Rep. No. 73-1455, at 55, 68 (1934). Indeed, the statute, by its terms, is intended to benefit every security holder in each company that has a registered class of equity securities under Section 12 of the Securities Exchange Act. Potential Section 16(b) plaintiffs, therefore, include, *inter alia*, security holders in all of the companies whose stock is traded on the New York Stock Exchange, the American Stock Exchange, and the National Association of Securities Dealers Automated Quotation System.

Uniform interpretation by the courts of the time period during which these millions of potential Section 16(b) plaintiffs may investigate and file claims to recover short-swing profits is essential to furthering the purpose of the statute where, as here, the Section 16(a) report of the transaction is filed late. The limited number of cases litigated under Section 16(b) arising from late-filed reports is in part the result of the clear rule of *Whittaker* regarding the exact time period in which plaintiffs must act to recover the insider's short-swing profits.[2] Not only does the Second Circuit's conflicting interpretation of the statutory time period inject confusion and uncertainty into this process, but it also has the potential of rewarding the insiders -- as in this case -- by allowing them to retain their short-swing profits at the expense of the corporation and its security holders.

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[2] *See, e.g.*, Peter J. Romeo & Alan L. Dye, *Section 16 Treatise and Reporting Guide* § 8.01, 8-26 ("Only a small fraction (probably less than five percent) of all Section 16(b) claims ever reach a court docket. The simplicity of Section 16(b), the mechanical nature of its operation, and the availability of a large body of law for guidance, result in most claims being settled or otherwise disposed of without resort to litigation." (footnotes omitted)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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